Supreme Court, U.S.
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No. 93-1656

In The

Supreme Court of the United States

October Term, 1993

P.T. EICHELBERGER, JR., M.D., et al.,

Petitioners,

v.

DOUGLAS AYCOCK, M.D., et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals correctly ruled that a judgment debt based on malicious prosecution by the Petitioners is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(6).

PARTIES TO THE PROCEEDING

Petitioners are P.T. Eichelberger, Jr. and Louis B. Hughes.

Respondents are:

Douglas Aycock, Donald Chalmers, D.C. Delery, Clarence O. Dube, William H. Fagan, Eugene Fontenot, Charles Hill, Charles M. Howard, Glen Keller, Edward Roberson, E.O. Smith, Houston North Hospital Properties, Houston North Properties, Houston Northwest Medical Center, Inc., and Houston Northwest Medical Center Survivor, Inc.

There are no parent or subsidiary companies requiring disclosure under Rule 29.1 of the Rules of the Supreme Court of the United States.

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TABLE OF AUTHORITIES

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CASES CITED:

Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991) 1, 2, 4

Kale v. Palmer, 791 S.W. 2d 628 (Tex. App. – Beaumont 1990, writ denied) 5

STATUTE CITED:

11 U.S.C. § 523 (a)(6) 1, 2, 4, 6

RULES CITED:

Rules of the Supreme Court of the United States:

Rule 13 2

Rule 14.5 2

OPINIONS BELOW

This proceeding was originally instigated as a bankruptcy adversary proceeding in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. The purpose of the proceeding was to determine the dischargeability of two judgments owed Respondents by Petitioners Hughes and Eichelberger.

After erroneously applying a heightened burden of proof for denial of discharge (i.e., clear and convincing evidence), the bankruptcy court found that Respondents, the judgment creditors, had failed to prove by clear and convincing evidence that the judgments were nondischargeable under Section 523(a)(6) of the Bankruptcy Code.

The district court on appeal held that under *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), the bankruptcy court had erred in applying the heightened burden of proof and ruled that the judgment debts based on tortious interference and malicious prosecution were nondischargeable under 11 U.S.C. § 523(a)(6).

Petitioners Hughes and Eichelberger then filed an appeal with the United States Court of Appeals for the Fifth Circuit. In an unpublished per curiam opinion, the Fifth Circuit affirmed the district court's ruling regarding the malicious prosecution judgment and reversed the district court's ruling regarding the tortious interference judgment.

REPLY TO PETITIONERS' STATEMENT OF JURISDICTION

The Court should deny the Petition for Writ of Certiorari for several reasons. First and foremost, the petition should be denied based on Petitioners' attempt to have this Court review by certiorari two state court judgments long after the deadline for doing so has passed. Sup. Ct. R. 13. Second, the petition should be denied since the Fifth Circuit's ruling is directly supported by this Court's decision in *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Finally, the petition should be denied based on the failure of Petitioners to present their points for consideration with accuracy and clarity. Sup. Ct. R. 14.5.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523(a)(6) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

* * * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

* * * *

STATEMENT OF THE CASE

Rather than attempting to reargue and relitigate almost two decades of litigation as Petitioners have

sought to do, no attempt will be made to respond point by point to the numerous half truths, outright misstatements, and legal illogic which permeates the Petition for Writ of Certiorari. Instead, this Brief in Opposition will address only those facts which have a bearing on what issues would properly be before this Court if certiorari were granted. In that regard, a statement of the relevant facts appears below.

1. On November 24, 1982, a money judgment was entered against Petitioners in the 11th Judicial District Court of Harris County, Texas based on Petitioners' tortious interference.

2. On December 8, 1986, a money judgment was entered against Petitioners in the 334th Judicial District Court of Harris County, Texas for malicious prosecution.

3. Following Petitioners' filing of petitions for relief under Chapter 11 of the Bankruptcy Code, the Respondents filed a complaint in the bankruptcy proceeding requesting a determination that their claims against Petitioners based on the judgments were exempt from discharge in bankruptcy pursuant to 11 U.S.C. § 523(a)(6). That proceeding was eventually appealed to the district court and then to the Fifth Circuit.

4. As indicated above, the Fifth Circuit ruled that the judgment debt based on Petitioners' tortious interference is dischargeable but that the judgment debt based on Petitioners' malicious prosecution is nondischargeable. Because the Fifth Circuit has ruled that the judgment debt based on tortious interference is dischargeable, any complaints by Petitioners with respect to the validity of that debt are now moot and will not be addressed further.

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly ruled that the preponderance of the evidence standard applies to dischargeability cases and that collateral estoppel is appropriate in dischargeability cases to avoid relitigation of issues already resolved in state court. In addition, the Fifth Circuit correctly ruled that the judgment debt based on malicious prosecution by the Petitioners is nondischargeable in bankruptcy since a cause of action for malicious prosecution in Texas includes the elements of willfulness and malice found in 11 U.S.C. § 523(a)(6).

ARGUMENT

This Court in *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) made it clear that the correct burden of proof for dischargeability cases is preponderance of the evidence and that the application of collateral estoppel is appropriate in dischargeability cases in order to avoid relitigation of issues already resolved in state court. As pointed out by each of the courts below, a court cannot discharge a debtor from any debt for willful and malicious injury by the debtor. 11 U.S.C. § 523(a)(6).

In light of the foregoing, The Fifth Circuit correctly ruled that the bankruptcy court cannot discharge the judgment debt arising out of Petitioners' malicious prosecution. As pointed out by the Fifth Circuit in its opinion, to recover for malicious prosecution a plaintiff must prove these elements:

a. The defendant filed the suit without probable cause;

b. The defendant was malicious;

c. The defendant lost the suit; and

d. The suit damaged the plaintiff.

See, Kale v. Palmer, 791 S.W.2d 628, 633 (Tex. App. – Beaumont 1990, writ denied). Because all of the elements of willful malice set forth in Section 523(a)(6) are encompassed in the malicious prosecution cause of action, the Fifth Circuit correctly reasoned that the bankruptcy court could not discharge the judgment debt for malicious prosecution.

Contrary to what is argued in the Petition for Writ of Certiorari, there is absolutely no basis for avoiding the collateral estoppel effect of the malicious prosecution judgment. Each of the courts below found that the judgment was a valid final judgment and that the application of collateral estoppel was proper. Petitioners' contention that they received no notice of the trial setting and were denied due process is clearly refuted by the bankruptcy court's finding that "The statement of facts from that trial is replete with evidence of notice being given to debtors' counsel of the conduct of the trial." The bankruptcy court also pointed out that the court of appeals' decision in that case stated that "the record reflects a degree of participation in the trial of these cases that in our experience is unparalleled." Accordingly, Petitioners simply cannot now contend that they had no opportunity to litigate these matters. Likewise, there has never been any basis for Petitioners' assertion that the Respondents have perpetrated a "fraud on the courts", or have filed fraudulent proof of claims. Again, the courts below held that the

judgment was a valid judgment. In addition, the bankruptcy court did not purport to rule one way or the other on any objections to the proof of claims filed in this case instead expressly reserving that issue.

CONCLUSION

The correct burden of proof for dischargeability cases is the same as the burden of proof in the original suit, a preponderance of the evidence. Accordingly, the Fifth Circuit correctly ruled that the bankruptcy court had improperly applied a heightened burden of proof and that under the preponderance of the evidence standard, the bankruptcy court cannot discharge the judgment debt arising out of Petitioners' malicious prosecution because the malicious prosecution cause of action includes the elements of willful malice set forth in 11 U.S.C. § 523(a)(6). Accordingly, the Petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,

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